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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 121

SAM WALDER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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INDEX

Subject Index

	Page
Brief for Petitioner	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Amendments and Rule Involved	2
Statement of the Case	3
Holdings Below	5
Argument	6
1. It was error under the *Weeks* rule to admit evidence of the illegal search	6
2. Extrinsic evidence is never admissible for impeachment	13
3. The doctrine of harmless error cannot apply to this case	16
Conclusion	18
Appendix A—Record of the 1950 Proceedings	21
Proceedings	21
Motion for the Return of Seized Property and the Suppression of Evidence	22
Affidavit	23
Record Entry	24
Order	25
Record Entry	27
Appendix B—Fourth Amendment Cases Since *Harris* v. *United States*	28

Table of Authorities

Cases:

Agnello v. *United States*, 269 U.S. 20 (1925)	7, 8, 10, 13
Boyd v. *United States*, 116 U.S. 616 (1886)	9
Brinegar v. *United States*, 338 U.S. 160 (1949)	16
Gibson v. *United States*, 149 F.2d 381 (C.A.D.C. 1945)	11
Glover v. *United States*, 147 Fed. 426 (C.A. 8, 1906)	14-15

BLURRED COPY

Page

Go-Bart Importing Co. v. *United States*, 282 U.S. 344 (1931) 13
Goldstien v. *United States*, 316 U.S. 114 (1942) 6
Gouled v. *United States*, 255 U.S. 298 (1921) 13
Grau v. *United States*, 287 U.S. 124 (1932) 13
Harris v. *United States*, 331 U.S. 145 (1947) 6
Honeycutt v. *United States*, 277 Fed. 941 (C.A. 4, 1921) 16-17
Kotteokos v. *United States*, 328 U.S. 750 (1946) 16, 17
Krulewitch v. *United States*, 336 U.S. 440 (1949) 17
Mahoney v. *United States*, 26 F.2d 902 (C.A. 4, 1928) 10-11
Mitrovich v. *United States*, 15 F.2d 163 (C.A. 9, 1926) 15
Nardone v. *United States*, 308 U.S. 338 (1939) 9
Nueslein v. *District of Columbia*, 115 F.2d 690 (C.A.D.C. 1940) 9, 18
Pearson v. *United States*, 192 F.2d 681 (C.A. 6, 1951) 14
Perlman v. *United States*, 247 U.S. 7 (1918) 8
Schwartz v. *Texas*, 344 U.S. 199 (1952) 9
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920) 9
Stein v. *New York*, 346 U.S. 156 (1953) 16
United States v. *Antonelli Fireworks Co.*, 155 F.2d 631 (C.A. 2, 1946) 17
United States v. *Klass*, 166 F.2d 373 (C.A. 3, 1948) 14
United States v. *Reed*, 96 F.2d 785 (C.A. 2, 1938) 16
United States v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949) 9
Weeks v. *United States*, 232 U.S. 383 (1914) 6, 9, 11, 13
Wolf v. *Colorado*, 338 U.S. 25 (1949) 9, 13

Constitution, Statutes and Rules:

Fourth Amendment 2, 6, 11, 14, 15
Sixth Amendment 2, 14, 15
26 U.S.C. § 2554(a), 53 Stat. 272 4
28 U.S.C. § 1254(1) 1

BLEED THROUGH– POOR COPY

Page

28 U.S.C. (1946 Ed.) § 391, 45 Stat. 54 17
Rule 41(e), Federal Rules of Criminal Procedure 2, 12
Rule 52(a), Federal Rules of Criminal Procedure 17
Form 16, Appendix, Federal Rules of Criminal Procedure 3

Miscellaneous:

Record, *Agnello* v. *United States*, No. 6, 1925 Term 8
Cornelius, Search and Seizure (2 Ed. 1930), §§ 7-10 9
Lasson, History and Development of the Fourth Amendment (1937) 9
1 Wharton, Criminal Evidence (11 Ed. 1935), §§ 373-375 9
3 Wigmore (3 Ed. 1940), §§ 824, 877, 977-988 13
8 Wigmore (3 Ed. 1940), § 2184 9
150 A.L.R. 566 (1944) 9
Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Col. L. Rev. 11 (1925) 9
Atkinson, Prohibition and the Doctrine of the Weeks Case, 23 Mich. L. Rev. 748 (1925) 10
Chaffee, The Progress of the Law, 1919-1922, 35 Harv. L. Rev. 673 (1922) 10
Comment, Evidence, 42 Mich. L. Rev. 679 (1944) 10
Comment, Pre-Indictment Suppression of Invalid Confessions, 56 Yale L. J. 1076 (1947) 10
Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 191 (1930) 10
Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921) 10
Note, Admissibility in State Courts of Evidence Obtained by Unreasonable Searches and Seizures, 35 Minn. L. Rev. 457 (1951) 10

BLURRED COPY

Wingren, The Law of Searches and Seizures, 18 Rocky Mtn. L. Rev. 345 (1946) .....
Advisory Committee, Federal Rules of Criminal Procedure, Preliminary Draft (1943) .....
Advisory Committee, Federal Rules of Criminal Procedure, Second Preliminary Draft (1944) .
Advisory Committee, Federal Rules of Criminal Procedure, Final Report (June 1944) .....

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 201 F. 2d 715 (R. 185).[1]

Jurisdiction

The judgment of the Court of Appeals was entered on February 19, 1953 (R. 190). Petitioner's *in forma pauperis* petition for certiorari was filed on April 20, 1953, to which date the time for filing had been extended on March 16, 1953 (R. 191). This Court granted certiorari on June 15, 1953, 345 U. S. 992. Jurisdiction is invoked under 28 U. S. C. § 1254(1).

[1] "R." references may be found in the printed stipulated Record.

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Questions Presented

In a previous prosecution of the petitioner, evidence that he possessed narcotics was held to have been obtained by illegal search and seizure, and suppressed, and the indictment was thereafter dismissed. In this second proceeding, involving a later and different narcotics offense, the evidence was admitted on rebuttal to disprove petitioner's testimony that he had not been guilty of the first offense.

The principal question presented is whether evidence obtained by unlawful search which is inadmisssible to prove the case in chief may nevertheless be admitted to impeach the defendant if he takes the stand.

A second question, which the Court will not reach unless the first is resolved against petitioner, may be stated as follows: Whether defendant's actual guilt under a former indictment which was dismissed may be proved by extrinsic evidence introduced to impeach him in a prosecution for a subsequent offense.

Constitutional Amendments and Rule Involved

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

Rule 41(e), Federal Rules of Criminal Procedure:

"(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was

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illegally seized without warrant, . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

Statement of the Case

In 1950, before the prosecution in the case at bar, federal narcotics agents arrested the petitioner, Walder, his wife and a third person in Kansas City on information they were in possession of illegal narcotics. The agents searched them but found nothing. The prisoners were nonetheless booked, jailed and Walder's keys taken from him. After several hours, the agents placed Walder in a car, drove to his apartment and began to search it. They found a one-ounce capsule of heroin. The officers admitted that they had no knowledge prior to the search that there were any narcotics concealed in the defendant's home (A. 23-27).[2]

On the basis of this search petitioner was indicted for illegal sale and illegal possession (A. 25). He moved to suppress the evidence under Rule 41(e), F. R. Crim. P. His motion, following Form 16, Appendix, F. R. Crim. P., prayed that the property "be returned to him and that it be suppressed as evidence against him in *any* criminal proceeding." (A. 22). (Emphasis added.) The matter came on for hearing before Judge Duncan. Petitioner alleged, and the court found, that the agents had failed to secure a search warrant (A. 24, 26). The evidence was not seized during an arrest, and the search was not justified by certain knowledge that a crime was being committed. A federal commissioner could easily have been

[2]Appendix A to this Brief, to which the "A." references in this section refer, contains the docket entries and copies of documents relevant to these 1950 proceedings. Original certified copies have been lodged with the Clerk's Office. The material was before the District Court during these proceedings (R. 164).

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reached during the long detention if there had been grounds justifying a warrant. The search under all the authorities in the field was "unreasonable." The Court therefore granted the motion (A. 27), and shortly thereafter the Government voluntarily dismissed the 1950 indictment (A. 27).

One year later, in 1951, petitioner was indicted in the case at bar on four counts (R. 5) charging him with four separate sales of heroin in violation of the Internal Revenue Code, 26 U. S. C. § 2554(a), 53 Stat. 272 (R. 6-7). He entered a plea of Not Guilty. In its case in chief the prosecution introduced federal agents who testified that they had secured the services of two dope addicts and had observed them telephoning defendant to arrange sales of heroin, had given them money to purchase the drugs, and had searched them just prior to each of the alleged purchases made by them (*e.g.*, R. 117-137). The two addicts corroborated the working arrangements with the Government and testified directly as to the four purchases charged in the indictment (R. 87-117). The testimony thus followed the customary pattern in such cases.

The sole witness for the defense was the defendant himself. He denied ever having sold or given anyone narcotics (R. 137-138). He gave as a reason for the testimony against him that each of the two dope addicts had cause to dislike him. Jenkins was indebted to him (R. 144-147). Taylor had come to his apartment one evening to demand a loan; defendant refused and Taylor threatened to "get even" (R. 151-154). Aside from these incidents, petitioner denied any dealings with either one (R. 149, 154).

On cross-examination, the prosecuting attorney asked petitioner if he had ever "had anything to do with narcotics," which he denied (R. 161). He was then asked "whether or not the evening of February 19th or early in the morning of February 20th [1950], in the company of agents Follmer and Witt of the Narcotics Bureau here in Kansas City, Mis-

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souri, you went to your apartment at 2620 Prospect here in Kansas City, Missouri?" He answered "Yes." (R. 162).

> "Q. [By Mr. Aull] Now, when you arrived at that apartment, I will ask you, Mr. Walder, whether or not you turned over to them 1 grain of heroin?
> "A. I did not." (R. 163).

Petitioner's counsel objected and the Court heard argument at the bench. The prosecuting attorney stated he "intend[ed] to prove that there was on that occasion found one grain of heroin in his apartment" (R. 164). The Court allowed the questioning (R. 165), and plaintiff stood by his denial (R. 166). Then, on rebuttal, the prosecution introduced affirmative testimony as to this 1950 discovery of narcotics in petitioner's apartment. This evidence is the heart of the case (R. 174):

> "Q. [By the prosecuting attorney] I will ask you [narcotics agent Witt] further whether or not after arriving at that address, this defendant delivered to you one capsule of heroin containing 1.1 grains?
> "A. He turned the capsule over to Agent Follmer in my presence.
> "Q. What was done with the capsule?
> "A. It was delivered to the United States chemist for analysis."

Holdings Below

District Judge Duncan admitted the questions concerning this illegal search in the trial as to the 1951 sales. He held that "further testimony concerning it" (R. 166) had now become competent because of the fact that petitioner had "opened . . . up" the matter of prior possession and that the prosecution was entitled to submit countervailing evidence, even if the product of an illegal search, for "impeachment of his statements" (R. 164). The court charged the jury that the evidence would "be admitted solely by way

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of impeachment of the witness' statement that he had never had anything to do or any connection with narcotics" (R. 186), and in his later instructions stated: "So the Court simply admits that testimony for whatever it is worth in determining the weight of this evidence" (R. 181).

The Court of Appeals for the Eighth Circuit affirmed the ruling by a two-to-one vote, but the opinion fails to set out the reasoning on which the result was based (R. 185). It held simply that the testimony had been adduced for the "sole purpose of impeaching the credibility of the appellant." "In such a case the evidence is admissible" (R. 188). It cited no direct authority for this proposition.

Argument

1. *It was error under the Weeks rule to admit evidence of the illegal seizure.*

This case raises no issues of fact. That the search and seizure in 1950 was forbidden by the Fourth Amendment is an adjudication which cannot be collaterally attacked in this case.

"It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection . . . And we have further held that the policy underlying the amendment cannot be circumvented by the indirect use against the victim of the evidence so obtained." *Goldstien* v. *United States*, 316 U.S. 114, 120 (1942).[3]

---

[3] Most of the thirty-five cases that have reiterated the rule in this Court since *Weeks* v. *United States*, 232 U.S. 383 (1914), are set out and analyzed by Mr. Justice Frankfurter in an Appendix to his dissent in *Harris* v. *United States*, 331 U.S. 145 (1947) beginning at 175. We have brought the list up-to-date in our Appendix B (A. 28).

Needless to say, the rule has been extensively applied in the lower courts. Shepard's citations to *Weeks* v. *United States*, *supra*, for instance, cover sixteen full columns.

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The Government attacks neither the factual determination nor the rule. But it attempts, in its argument here, to create a special exception, which it induced the Eighth Circuit to adopt—that evidence of an illegal search, clearly inadmissible to prove the offense itself, may be admitted on rebuttal to impeach the credibility of a criminal defendant who takes the stand and affirmatively protests his innocence.

That this is not the law is conclusively shown by *Agnello* v. *United States*, 269 U.S. 20 (1925), which the Circuit Court ignored. Agnello and others were indicted for a conspiracy and an illegal sale of narcotics. The federal agents had arrested the gang just after the exchange took place. On trial, they stated they had watched Agnello bring the container of narcotics to the place of sale. Agnello, in defense, said he had had no idea what was in the can, and, on cross, denied ever possessing narcotics. The prosecution produced a second can of opium. Agnello claimed he had never seen it before. Then, on rebuttal, the prosecution adduced the agents' testimony that this second can had been seized in Agnello's own bedroom on the same day the sale was made.

This Court unanimously held that seizure illegal. As to the testimony describing it, it said (Id. at 25):

> "[T]he contention that the evidence of the search and seizure was admissible in rebuttal is without merit."

We rest on the proposition that the result in *Agnello* compels a like result here.

The Government admits the two cases are similar "at first blush." But it argues that the *Agnello* decision can be distinguished on the ground the opinion "implicity recognized that, had Agnello on direct examination given testimony which could have been construed as opening the door to examination concerning the suppressed narcotics, the cross-examination and the admission of that evidence might have been justified." (Br. in Opp. 9).

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The record shows that no such distinction can be made. Walder "opened the door" no wider than did Agnello. The Record of that trial indicates Agnello just as flatly denied on his direct examination that he had ever handled narcotics:

> "Q. Have you ever spoken to [Centorino, another defendant] at any time in your life about cocaine? About selling cocaine?
>
> "A. No, sir.
>
> "Q. Did you ever have any conversation with Alba about selling cocaine?
>
> "A. No, sir." (Record, *Agnello* v. *United States*, No. 6, 1925 Term, p. 471.)
>
> • • • • • • •
>
> "Q. Up to that time had you heard any discussion about the sale of narcotics?
>
> "A. No, sir." (Id. at 473.) [4]

No distinction can logically be made between this sort of testimony and Walder's denial that he had possessed narcotics. If Agnello's denial was immune, Walder's should be as well. Neither waived his right to object. *Cf., Perlman* v. *United States*, 247 U. S. 7 (1918).

The authorities are unanimously against the Government's implied waiver theory. Evidence which is the result

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[4] And the Government put forward the same implied waiver argument in this Court:

> "It was only where the defendant, Frank Agnello, on the witness stand, resorted to obvious falsehoods, testifying that he did not know that he was carrying narcotics on the night of the arrest, that he had never seen narcotics before, and that he had never seen the can of cocaine hydrochloride until the trial—it was only then, in rebuttal of these statements, that the Government was permitted to give evidence that the can had been found in his room. . . . The evidence of the search was used only as a means of discrediting the witness, and was not used in any way either as a direct part of the Government's main case, or as an indirect clue toward obtaining other evidence." Res. Br., Record, *Agnello* v. *United States*, No. 6, 1925 Term, pp. 17-18.

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of an illegal search is just as inadmissible on rebuttal as it is on the prosecution's case in chief. It would serve no purpose to set out the language from the many opinions in this Court since *Boyd* v. *United States,* 116 U. S. 616 (1886), and *Weeks* v. *United States,* 232 U. S. 383 (1914), dealing with the inadmissibility rule. None imply that such evidence can ever be admitted; all state, in substance, that it is "clearly inadmissible," *e.g., Schwartz* v. *Texas,* 344 U. S. 199, 201 (1952), no matter how extreme the invitation by the defendant or how special the case. For plainly, any theory that the prosecution can submit testimony of an illegal search

> "reduces the Fourth amendment to a form of words. The essence of a provision forbidding acquisition of evidence in a certain way is not merely evidence so acquired shall not be used before the Court but that it shall not be used at all . . ." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920).[5]

We are unable to find a case where the Government's alleged exception has been approved in any other court. We have examined not only federal cases but decisions in those states which have adopted the federal rule.[6] Each one states that evidence obtained during an illegal search may not be adduced for any purpose. The texts and law review literature in the field are similarly unqualified.[7]

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[5] Silverthorne left no doubt that the evidentiary rule prohibits oral testimony as to the results of an illegal search and seizure, as well as introduction of the physical evidence. See, *e.g., United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, 796 (1949); *Nardone* v. *United States,* 308 U.S. 338 (1939); *Nueslein* v. *District of Columbia,* 115 F. 2d 690 (C.A.D.C., 1948).

[6] About half the states. See note, 150 A.L.R. 566 (1944), previous compilations there cited, and Appendix A to Opinion of the Court, *Wolf* v. *Colorado,* 338 U.S. 25, 33 (1949).

[7] Cornelius, Search and Seizure (2 Ed. 1930) §§ 7-10; Lasson, History and Development of the Fourth Amendment (1937); 1 Wharton, Criminal Evidence (11 Ed. 1935) §§ 373-375; 8 Wigmore (3 Ed. 1940) § 2184. Atkinson, Admissibility of Evidence Obtained Through Unreasonable

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Nor have any of the other constitutional or statutory rules of exclusion erected by this Court been so undermined. We know of no case involving coerced confessions in the states, or *McNabb* confessions or wiretap evidence in the federal courts, which have admitted such evidence "in rebuttal" after holding it incompetent on direct. Prosecuting attorneys have seldom attempted to push incompetent evidence through the back door as was done here and in *Agnello*. The only other reported example, apparently, is *Mahoney* v. *United States*, 26 F. 2d 902, 903 (C. A. 4, 1928), a case remarkably like this one. There, following testimony by a government "informer," defendant denied the charge of an illegal sale of whiskey to him. On cross-examination the prosecution asked whether or not agents had later found more whiskey in her house and when defendant denied this, adduced the testimony of the agents. The search was illegal. We reproduce a portion of the opinion of the unanimous Fourth Circuit because we think it illustrates how little merit the government's contention has:

> "The question, therefore, which we have to decide, is whether evidence obtained by an unlawful search, not admissible in chief, may be used on rebuttal for the purpose of contradiction. Undoubtedly a person accused of crime, who offers himself as a witness, occupies precisely the same position as any other witness, and may be examined as to any admissions he may have made, as well as to any contradictory

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Searches and Seizures, 25 Col. L. Rev. 11 (1925); Atkinson, Prohibition and the Doctrine of the Weeks Case, 23 Mich. L. Rev. 748 (1925); Chaffee, The Progress of the Law, 1919-1922, 35 Harv. L. Rev. 673, 694 (1922); Comment, Evidence, 42 Mich. L. Rev. 679 (1944); Comment, Pre-Indictment Suppression of Invalid Confessions, 56 Yale L. J. 1076 (1947); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 191, 203 (1930); Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921); Note, Admissibility in State Courts of Evidence Obtained by Unreasonable Searches and Seizures, 35 Minn. L. Rev. 457 (1951); Wingren, The Law of Searches and Seizures, 18 Rocky Mtn. L. Rev. 345 (1946).

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statements, and he may be examined generally as to all matters which affect his credibility, and, where the matter about which the accused is examined has direct relation to the charge on which he is being tried, it is, of course, competent to introduce evidence in contradiction; but it would be going very far to say that the rule ought to be extended to the point of allowing, under this guise, the admission of evidence which the court had already declared to be incompetent on the ground that it violated the Fourth Amendment, for it would be in effect to allow by an indirect method what admittedly could not be done by a direct method, and this the courts should be vigilant to oppose, 'nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search, where a timely challenge has been interposed.' Byars v. United States, 273 U. S. page 28, 47 S. Ct. 248, 71 L. Ed. 520. And this applies equally to all stages of the trial. Silverthorne v. U. S., 251 U. S. 390, 40 S. Ct. 182, 64 L. Ed. 319; Watson v. U. S. (C. C. A.) 6 F. (2d) 870.

"In the case at bar, the evidence of the commission of the offense was wholly given by a witness who was himself a persistent violator of the liquor laws. As between his evidence and that of the defendant, the jury might very well have had a reasonable doubt; but, when his evidence was sought to be supplemented by that of the prohibition officer obtained by an illegal search, the prejudice of the rights of the accused was substantial, and in our opinion constituted error, for which the judgment below should be reversed.

"Reversed."

The authorities the Eighth Circuit thought "supported" the District Court do not do so. Only one even mentions the Fourth Amendment or the *Weeks* doctrine; all the rest deal with general evidentiary propositions quite out of the realm of the Constitution. And in that one exception, *Gibson* v. *United States*, 149 F. 2d 381 (C. A. D. C.) *cert. den. sub.*

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nom.; O'Kelley v. *United States*, 326 U. S. 724 (1945), the Court of Appeals for the District of Columbia actually reversed the admission of the only evidence which had been illegally obtained.

Apart from the constitutional prohibition, the federal rules themselves forbid the admission of this evidence. Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> "If the motion [to suppress] is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

It would be difficult to imagine a clearer statement: The tangible evidence, if not contraband, is to be returned, and the fact of the discovery similarly wiped out for purposes of prosecution testimony. The history of the drafting of 41(e) sets at rest any doubt that this was the intent of the draftsmen. The rule, as worded in the Preliminary Draft (1943) was:

> ". . . shall not be admissible in evidence at any hearing or trial *of the proceeding in connection with which the seizure occurred.*" Advisory Committee, Federal Rules of Civil Procedure, Preliminary Draft (1943), Rule 33(e). (Emphasis added.)

See also Advisory Committee, Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), Rule 43(e). Constitutional questions aside, this formula might have permitted the introduction of the 1950 evidence, since the trial was "in connection with" 1951 sales and not with the earlier seizure. But the Committee, quite consciously, deleted the italicized portion. Advisory Committee, Federal Rules of Criminal Procedure, Final Report (June 1944), Rule 43(e). The Rule now reads that illegally secured evidence is inadmissible at "any" trial; this Court did not adopt the above italicized qualification.

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The result urged would be no "small impingement" on the general rule of exclusion; it would destroy it, in every case where the defendant took the stand. If the defendant did no more than deny the charge the prosecution could introduce illegally seized evidence to show that his denial was not to be trusted. The illegal seizure would thus become a potent weapon in the hands of the prosecution; the defense would not dare permit the accused to testify on the stand. Such a result cannot be consistent with this Court's many professions that the Amendment is to be "liberally" construed.[8]

2. *Extrinsic Evidence Is Never Admissible for Impeachment*

Actually, the Government is seeking a good deal more in this case than just the repeal of the *Weeks* rule. In the *Agnello* case, for instance, the can of narcotics illegally seized which the Government sought to use for impeachment purposes was found in the defendant's bedroom on the very day of the sale charged in the indictment. Hence, if it was competent evidence under the exception to the *Weeks* rule which the Government urged, there was no question as to its relevance to prove the crime on trial. It did not (as the suppressed evidence here does) relate to a separate and distinct offense committed at a different time and place.

But in the case at bar, the illegally seized narcotics related to an offense charged in an indictment dismissed over a year before. It was a similar crime, but other than its similarity in character, it had no probative value to prove the charge on trial. Therefore, if its competency under the Fourth Amendment be conceded, it must nevertheless be excluded as irrelevant. Independent proof of a similar crime is not admissible in evidence unless it is tied so closely

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[8] *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931); *Gouled* v. *United States*, 255 U.S. 298, 304 (1921); *Grau* v. *United States*, 287 U.S. 124, 128 (1932); *Wolf* v. *Colorado*, 338 U.S. 25, 28 (1949).

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to the crime in chief that it shows a pattern of conduct probative of the main charge. The Government has not satisfied the strict requirements of this somewhat dangerous rule. It has shown no connection between the alleged crime of 1950 and the crime in this case other than the fact that they were both violations of the Narcotics Act. Our law has not yet recognized the presumption that once a dope peddler always a dope peddler.

Therefore, the evidence is inadmissible here on a separate ground apart from the Fourth Amendment. Its introduction was an attempt to try the defendant for a collateral crime the substance of which is not stated in the indictment. To say that a defendant, by asserting on the stand that he has never committed any crime in his life, thereby opens the door for the prosecution to prove any and all previous crimes on which it has evidence, and try them for the first time under the cloak of the doctrine of impeachment is to fly in the face of the Sixth Amendment.

But the admission of this evidence for impeachment would violate more than the Sixth Amendment. It would also repeal the long-established rule that the prosecution may not introduce extrinsic evidence of any sort on rebuttal, with the sole exception of an actual record of conviction, to contradict a defendant's testimony on a collateral issue. See 3 Wigmore (3 Ed. 1940) §§ 824, 877, 977-988, especially 977-979. As was said in *United States* v. *Klass*, 166 F. 2d 373, 376-7 (C. A. 3, 1948):

> "Except in the event of a record of conviction, contradictory extrinsic evidence is not admissible, it being long settled that the answer of a witness on cross-examination with respect to a collateral matter introduced for impeachment purposes concludes the inquiry."[9]

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[9] "It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime

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If, in this case, the material illegally obtained had been a letter signed by the defendant admitting the crime in issue, only the Fourth Amendment would stand in the way of its use for impeachment. But here the prosecution must produce witnesses to prove the defendant lied on the collateral issue whether he had possessed narcotics during a period not charged in the indictment. A defendant in this situation would certainly be entitled to produce witnesses in defense and to complete the circle the prosecution should be allowed to produce more witnesses in rebuttal. And so the trial within a trial would go on.

Of course, it could not be called a trial of a previous offense without violating the prohibition of the principle of the Sixth Amendment that an indictment must give the substance of the offense which is to be tried. To invoke this principle on the ground that the issue raised was not actually a trial for the first offense but only impeachment of credibility would require an instruction like the following:

"The Jury is instructed that evidence of possession of narcotics by the defendant in 1950 is not to be taken as proof that the defendant committed a crime under the Narcotics Act in 1950, but only as evidence that the defendant lied when he said that he did not commit such an offense in 1950."

The Government has characterized the exception to the rule of exclusion which it urges here as only a "small impingement" of previously established principles. It seems

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must rise to the dignity of a felony or petit larceny. * * * Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted, for the reason that innocent men are often arrested charged with a criminal offense." *Glover* v. *United States*, 147 Fed. 426, 429 (C.A. 8, 1906). See also, *Mitrovich* v. *United States*, 15 F.2d 163, 164 (C.A. 9, 1926); *Pearson* v. *United States*, 192 F.2d 681, 698-9 (C.A. 6, 1951).

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to us, however, that the Government is trying to admit a rather sizeable bull into the legal china shop. We await with interest an explanation of how this bull once admitted in this case can be prevented from running wild over the cherished heirlooms of the law.

3. *The Doctrine of Harmless Error Cannot Apply to This Case*

If it were ever held that the admission of illegally obtained evidence could be ignored on the ground that there was sufficient evidence to convict apart from that evidence, the rule would be no longer a deterrent to illegal searches and seizures.[10] The Government could always argue that the corroboration of its stool pigeon testimony by additional evidence gleaned from an illegal search was not serious enough to affect the verdict. And how could the Court ever ascertain whether this was true.[11] Limiting instructions to

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[10] No constitutional rule of evidence has ever been so determined. *Stein* v. *New York*, 346 U.S. 156, 193 (1953), the Court's recent New York confession case, is no exception. The Court said:

> ". . . we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error."

We have examined a great number of federal wire tapping, search and seizure and illegal detention cases and have found only *United States* v. *Reed*, 96 F. 2d 785 (C.A. 2), cert. den., 305 U.S. 612 (1938), holding evidence, incompetent under one of these rules (the purely nonconstitutional prohibition against wire tappping), harmlessly admitted though not cumulative. See also note 11, *infra*.

[11] *See Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). "For a variety of reasons relating not only to probative value and trustworthiness, but also to *possible prejudicial effect upon a trial jury* and the absence of opportunity for cross-examination, the generally accepted rules of evidence throw many exclusionary protections about one who is charged with and standing trial for crime. Much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury." *Brinegar* v. *United States*, 338 U.S. 160, 173 (1949). (Emphasis added).

The situation illustrated by *Honeycutt* v. *United States*, 277 Fed. 941

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the jury to ignore the 1950 possession in deciding whether Walder made the 1951 sales, to quote Judge Frank, are like the Mark Twain story of a "boy told to stand in the corner and not think of a white elephant." *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 656 (C. A. 2), *cert. den.*, 329 U. S. 742 (1946). See also Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949). If it be argued that the innocent are protected since even an illegal search would not obtain drugs from persons who do not possess them, the answer is that the *Weeks*

> ". . .guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald* v. *United States*, 335 U. S. 451, 453 (1948).

Whatever its common-sense usefulness as to ordinary evidentiary problems, the doctrine of "harmless error" should have no place in constitutional rules. See *Kotteakos* v. *United States*, 328 U. S. 750, 764-765 (1946). These are far from the technical matters, see 28 U. S. C. (1946 Ed.), § 391, 45 Stat. 54, and its history, with which the doctrine is designed to deal. Rule 52(a), F. R. Crim. P., describes it as reaching "[a]ny error, defect, irregularity or variance which does not affect substantial rights." The right of the Fourth Amendment to be free of unreasonable searches and seizures, and to have evidence thereof withheld in the federal courts, is, we think, "substantial."

(C.A. 4, 1921) is easily distinguished. Certain checks, previously suppressed as evidence, were introduced. Defendant had already admitted the payments. Sensibly enough, the Court held the admission not prejudicial. In this case, though, Walder denied the fact that he had turned over the capsule in 1950.

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Conclusion

We can best close by repeating the words of the late Chief Justice Vinson in *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (C. A. D. C., 1940):

> "At common law evidence is admissible no matter how obtained. But we are living under more than common law . . . Under the federal rule some illegally obtained evidence is inadmissible, inadmissible because of the IVth Amendment. Critics may assail this rule but it is well established . . .
>
> "[T]he protection granted by constitutional provisions must not be dealt with as abstractions. A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home. Id. at 694-695.
>
> ". . . [I]s it more important to effectuate the vital constitutional policy of security in the home from general investigations directed toward the hope that some evidence will turn up, or the policy that all misdemeanants be brought to task. We feel that the policy of making effective in concrete cases 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, * * *' to be the more important." Id. at 696.

The judgment below should be reversed.

PAUL A. PORTER,
Counsel for Petitioner.

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APPENDICES

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Appendix A

RECORD OF THE 1950 PROCEEDINGS

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 17,751

THE UNITED STATES

vs.

SAM WALDERS

Vio.: Sec. 2553, T. 26

Illegal Sale of, and Purchase and Possession of Heroin Hydrochloride—2 Counts

PROCEEDINGS

Feb. 23, 1950, Commissioner's transcript filed.

May 3, 1950, Indictment filed.

May 4, 1950, The defendant appears in open court with counsel, waives formal arraignment and enters a plea of not guilty. Case set for trial May 16, 1950. Appearance bond to remain same and to be taken by the United States Commissioner. Old bond exonerated. Appearance bond filed. Order for return of cash bail (old bond) filed.

May 11, 1950, Motion for bill of particulars filed. Memorandum brief in support of motion for bill of particulars filed. Motion for return of seized property and suppression of evidence filed. Memorandum brief in support of motion for return of seized property and suppression of evidence filed. Motion to dismiss count 1 of the indictment filed. Motion to dismiss count 2 of the indictment filed. Memorandum brief in support of motion to dismiss the indictment filed.

May 12, 1950, Defendant appears in open court with counsel, and by leave of Court withdraws his plea of not guilty and refiles the motions that were heretofore filed.

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Plea of not guilty entered. Hearing on motions—Each side presents testimony. Defendant is permitted by the Court to amend his motion for return of seized property. Arguments of counsel presented. Case submitted to the Court, and taken under advisement.

May 15, 1950, Suggestions of the U. S. Attorney in opposition to defendant's motion for return of seized property and for suppression of evidence filed.

May 25, 1950, Order, sustaining the defendant's motion to suppress the evidence as to count 2; and overruling the motion for the return of seized property, and overruling motions to dismiss the indictment and counts 1 and 2 thereof, filed.

July 7, 1950, Case dismissed in open court by Judge Duncan upon recommendation of the Attorney General.

* * * * * * *

MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

[Caption omitted]

Sam Walders, hereby moves this court to direct that certain property of which he is the owner, namely; one (1) grain of Heroin Hydrochloride, and which on the morning of February 20, 1950, at the premises known as 2620 Prospect, Apt. #3, Kansas City, Missouri, in the Western District of Missouri, Western Division, was unlawfully seized and taken from him by two Federal Narcotic Agents, one of whose last name is Follmer and the name of the other said Federal Agent being unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and without a search warrant.

The petitioner attaches hereto his affidavit setting forth facts of his own personal knowledge, showing the circumstances of said unlawful seizure.

FRANCIS L. ROACH,
1210 Commerce Building,
Kansas City, Missouri,
Attorney for Defendant.

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Defendant hereby requests oral argument on the above motion.

FRANCIS L. ROACH,
1210 Commerce Building,
Kansas City, Missouri,
Attorney for Defendant.

"Filed in the U. S. District Court on May 10, 1950."
"Refiled on May 12, 1950."

* * * * * * *

AFFIDAVIT

STATE OF MISSOURI,
County of Jackson, ss:

Sam Walders of lawful age being first duly sworn upon his oath, states:

On Sunday, February 19, 1950, at about 9 P. M., I went to the Union Station at Kansas City, Missouri, to meet my wife Freda Walders, who was arriving from Chicago. I traveled to the Union Station in my automobile with a friend named Marvin Booker.

After I met my wife, my wife, Booker and I went to my car and as I was leaving the Union Station parking lot, another car blocked my car and prevented me from proceeding further. Mr. Follmer and another Federal Narcotic Agent got out of the car which had blocked us, and Mr. Follmer and the other agent proceeded to search all three of us, but found nothing by way of narcotic drugs. The said Federal Agents then took all three of us to the City Jail where we were confined about 10 P. M., and later we were taken to the County Jail and booked in.

At about 2 A. M. Monday, February 20, 1950, the two said Federal Agents took me from the County Jail after handcuffing me. The two Federal agents had with them two Deputy Sheriffs whose last names are Delahunty and Brice. The four of them took me from the County Jail without telling me where we were going. The four of them took me in a car to my apartment at 2620 Prospect, Apt. #3, Kansas City, Missouri. The Federal Agents used the key which they had taken from me at the time of my confinement at

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the City Jail to get into my apartment. The Federal Agents then proceeded to search my apartment, and, as a result of that search they found one (1) grain of Heroin Hydrochloride.

I did not, at any time, authorize or consent to the search of my apartment above described. Neither of the Federal Agents, nor the said Deputy Sheriffs, displayed any search warrant to me. According to the best of my information and belief they did not have any search warrant for said search.

Further Affiant Saith Not.

SAM WALDERS.

Subscribed and sworn to before me this 10th day of May, 1950.

DOROTHY H. FORLOW,
[SEAL.] *Notary Public.*

My Commission expires: March 23, 1954.
Filed in the U. S. District Court on May 10, 1953.
Refiled on May 12, 1953.

* * * * * * *

RECORD ENTRY

Friday, May 12, 1950.

[Caption omitted]

Now, on this 12th day of May, 1950 comes the parties of the above entitled cause into open court, the defendant in person and by counsel, Mr. Francis Roach, the Government by the United States District Attorney for the Western District of Missouri. Case is called, whereupon Counsel for defendant, by leave of Court withdraws his plea of not guilty heretofore entered and refiles the following motions: Motion to Dismiss Count I and II of the Indictment; Motion for a Bill of Particulars with Memorandum in support; Motion for return of seized property and for suppression of the evidence and memorandum in support; Defendant reenters his plea of not guilty to the counts in the indictment. Hearing on refiled motions is had. Testimony is presented on behalf of the defendant and the defendant rests. Testimony is presented on behalf of the plaintiff and the plaintiff rests. At the conclusion of the foregoing proceedings,

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the defendant asks permission to amend the Motion for return of seized property and for suppression of the evidence and memorandum in support, which permission is by the Court granted, and after oral arguments the Court takes the motions under advisement and the cause is passed for resetting, pending the Court's decision.

* * * * * * *

ORDER

[Caption omitted]

Plaintiff was indicted on two counts charging that on or about the 17th day of February, 1950, the defendant "did sell three and one-half (3½) grains of Heroin Hydrochloride, the same not being in the original stamped package as required by law," and the second count charging that on or about the 18th day of February, 1950, the defendant "did purchase and possess one (1) grain of Heroin Hydrochloride * * * "

The home of the defendant was searched by deputy sheriffs and narcotic agents on the night of February 18, 1950, and one grain of heroin was found. The defendant has filed a motion to suppress the evidence.

There is little dispute as to the facts. On the evening of February 19, 1950, about 9:00 o'clock P. M., the defendant, his wife and another person were arrested at the Union Depot in Kansas City by Federal Narcotic Agents. A cursory search of the parties was made, but no narcotics were found. The agents had theretofore had information indicating that the defendant and the parties had been guilty of possessing and selling narcotics, and under the law they were entitled to make the arrest.

The defendant and the other parties arrested were taken to the city jail in Kansas City, Missouri, where they were booked and their possessions taken from them, including the keys to the defendant's home.

About midnight, two narcotic agents and two deputy sheriffs, the latter being investigators for the sheriff's office who had worked on the case, took the defendant from the city jail to the county jail. The defendant was handcuffed, and one of the deputy sheriffs requested of the property custodian, the key to the defendant's home.

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Some time prior to these occurrences, the defendant had advised the officers that his residence was on Tracy Avenue. After the deputy sheriff had requested the keys from the property custodian, he stated that they were going to search the residence of the defendant. At that time, the defendant told them to "go ahead and search; but you won't find anything."

Thereupon the two agents and the two deputy sheriffs placed the defendant, still handcuffed, in an automobile and started to the address which had been given by the defendant. As they approached the address, the defendant stated —"I do not live at that address, there is no use to disturb my sister and brother-in-law. I live at 2620 Prospect." Thereupon the officers proceeded to the latter address, apartment 3. Upon their arrival, one of the officers attempted to unlock the door, but was unable to get the key to work. Whereupon the defendant, still handcuffed, took the key and opened the door, admitting the officers.

After the search was under way, the defendant observed that this was the home of himself and his wife and he didn't want it torn up, and stated that there was one grain of heroin at a certain place in the apartment. Upon a search of that particular place, a grain of heroin was found. One of the officers testified that they were getting ready to search that place when the defendant told them that the heroin was there.

It is admitted by the plaintiff that the search of the premises was not incidental to the arrest. The officers admitted that they had no reason to suspect or to believe that there was any heroin concealed in the defendant's home.

Unquestionably the motion must be sustained. No search warrant was obtained. The search was in the middle of the night, while defendant was handcuffed and in the custody of four officers.

It is suggested by the Government that the defendant gave consent to the search by making the statement "go ahead and search; but you won't find anything." I am unable to agree with that contention. More than casual acquiescence by one under arrest is required to give consent to a lawful search.

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In this case, as heretofore stated, the defendant not only was under arrest, but he was handcuffed and the statement had already been made by one of the officers that they were going to search his residence. I think it perfectly obvious to anyone that a search would have been made whether the defendant gave his consent or not. The fact that he gave the officers his correct address instead of the erroneous address first given by him, I think is not justification for determining that he did consent to the search.

The defendant and his wife were both in custody. If the officers had reason to believe that narcotics were concealed in his home, a search warrant could have been obtained long prior to the time when it would have been necessary to release the defendant, without a charge having been filed against him.

The motion to suppress the evidence as to Count II of the Indictment is therefore hereby sustained, and the motion for return of the seized property is hereby overruled.

The Motions to Dismiss the Indictment and Counts I and II thereof are also hereby overruled.

R. M. DUNCAN,
District Judge.

Dated: May 25, 1950.
Filed in the U. S. District Court on May 25, 1950.

* * * * * * *

RECORD ENTRY

Friday, July 7, 1950.

[Caption omitted]

Now, on this 7th day of July, 1950, upon the recommendation of the Attorney General of the United States, comes the United States District Attorney for the Western District of Missouri and moves the Court for Dismissal of the above cause,

It is therefore, Ordered that this cause be and the same hereby is dismissed.

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Appendix B

FOURTH AMENDMENT CASES
Since *Harris* v. *United States*

Harris v. *United States,* 331 U. S. 145 (1947)

Illegal draft cards seized during lawful arrest under warrant charging mail fraud. Seizure held valid and evidence admissible.

United States v. *Di Re,* 332 U. S. 581 (1948)

Counterfeit gasoline coupons seized from passenger incident to lawful search of an automobile. His arrest and search held illegal and the evidence inadmissible.

Johnson v. *United States,* 333 U. S. 10 (1948)

Arrest and search made when agents smelled opium smoke outside defendant's room. Arrest held without probable cause and the evidence inadmissible.

Trupiano v. *United States,* 334 U. S. 699 (1948)

Search of an illegal still made without a warrant but contemporary with lawful arrests. Evidence held procured in violation of Fourth Amendment and inadmissible.

McDonald v. *United States,* 335 U. S. 451 (1948)

Search made without warrant but contemporary with lawful arrest by agents who forced their way into apartment building. Evidence held illegally procured and inadmissible.

Brinegar v. *United States,* 338 U. S. 160 (1949)

Arrest and seizure of illegal liquor on a moving truck. Held justified by probable cause and evidence admissible.

United States v. Rabinowitz, 339 U. S. 56 (1950)

Valid arrest and search nearby desk containing forged postage stamps. Seizure held incident to arrest and evidence admissible.

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On Lee v. *United States*, 343 U. S. 747 (1952)

Broadcast of conversation from hidden radio on agent's person held not the result of a trespass and transcript admissible.

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